SUPREME COURT, U.S.
FILED
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No. 05 56

IN THE

Supreme Court of the United States

MARY O'BRIEN,
PETITIONER

v.

LUCAS ASSOCIATES PERSONNEL, INC.,
DOING BUSINESS AS LUCAS GROUP,
LUCAS ASSOCIATES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a Rule 56 summary judgment setting involving an employment discrimination case, is it improper for the Circuit or Trial court to substitute its opinion for that of the ultimate fact-finder and conclude that inconsistent and conflicting testimony by the movant-employer's representatives, does not present material issues of fact when the employer claims the employee quit, which assertion was controverted by the employee's retention of a letter of termination, therefore making one or all of the employer's witnesses not worthy of belief?

2. In an employment discrimination case, is it error to grant a Rule 56 summary judgment motion when the summary judgment evidence demonstrates equally plausible factual inferences from proven facts, being either discrimination or no discrimination, especially when the employer's affiants have demonstrated inconsistent positions regarding the stated reason for discharge and the affidavit assertions are belied by the employer's affiants handwritten notes made earlier in time, thereby at least establishing the requisite suspicion of mendacity?

3. Does the Fifth Circuit's opinion in *O'Brien* which resolves credibility issues in favor of the movant-employer (by explaining the inconsistencies away as unsupported by the record [there was support] or so trivial as to be immaterial), ignore this Court's decision in *Reeves v. Sanderson*

Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) which: (1) clearly places credibility determinations within the province of the fact-finder; (2) permits the fact-finder to infer the ultimate finding of unlawful discrimination based on the *prima facie* case combined with sufficient evidence of the falsity of the stated reason for the employment action and (3) requires no additional independent evidence of discrimination?

4. Do the conflicting opinions of the Fifth Circuit regarding the plaintiff's burden in the summary judgment setting involving an employment discrimination case undermine the principle of *stare decisis* to the point it deprives litigants of the ability to accurately consider the merits of liability, particularly when as here, the Fifth Circuit, begrudgingly concedes a *prima facie* case, and then concludes the employee's claim is so merit less that the case is remanded for an assessment of attorney fee, even though the trial court previously declined to assess attorney fee?

5. Whether this Court's opinion in *Desert Palace Inc., v. Costa* which when coupled with uncontroverted evidence of mixed motive, obliges the employer to prove the same decision would have been made without the improper influence, which, when coupled with conflicting evidence on the central issue i.e. did the employee quit or was she fired, always renders the issue one of a question of fact?

6. Whether the Fifth Circuit comports with this

Court's rulings in *Reeves v. Sanderson Plumbing Products, Inc.*, *Anderson v. Liberty Lobby, Inc.*, and *Lytle v. Household Manufacturing, Inc.*, inasmuch as in this case, the Fifth Circuit makes credibility determinations, weighs evidence , performs functions of the fact-finder and when weighing the evidence concludes the evidence is non-existent, conclusory, subjective belief and non-probative without any explanation and not referencing any of the evidence offered in opposition, which in this case consisted of 69 pages of evidence?

7. In the summary judgment matrix, are the circuit courts, which reject the non-movant evidence required to articulate the evidence offered and the reasons for the conclusion the non-movant evidence is so weak it could never be probative of unlawful discrimination, in other words, should the trial court and / circuit court set out the evidence offered by the non-movant and state why the evidence is not material or so weak it could never raise a material issue of fact?

8. When comparator evidence is used as a form of circumstantial evidence to establish discrimination, must the comparable employee be involved in nearly identical circumstances in order for the evidence to be received and considered?

9. Can a Circuit Court reverse and remand solely on the issue of attorney fee and costs for a prevailing employer although not having found

the action was frivolous, brought in bad faith, unreasonable and particularly after the Circuit Court concludes the Plaintiff made a *prima facie* case?

PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings in this case in the United States

Court of Appeals for the Fifth Circuit:

A. Mary O'Brien, Plaintiff-Appellant-Cross-Appellee
B. John E. Wall, Jr., Attorney for Plaintiff-Appellant-Cross Appellee
C. Lucas Associates Personnel, Inc., doing business as Lucas Group; Lucas Associates, Inc., Defendants-Appellees-Cross Appellants
D. Stephen E. Fox and the Law Firm of Fish & Richardson, P.C., Attorneys for Defendants-Appellees-Cross-Appellants.

John E. Wall, Jr.
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The opinion of the United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Northern District of Texas, which granted summary judgment in favor of the Respondent. The Fifth Circuit also reversed and remanded for an assessment of attorney fee as costs. The Fifth Circuit's April 5, 2005 opinion is printed here as 1a-13a. The District Court's May 18, 2004 memorandum opinion and order are printed here as 14a-29a.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit entered on April 5, 2005.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

APPLICABLE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES

1. The rules applicable to this case are as follows:

Federal Rule of Civil Procedure 56

Rule 56. Summary Judgment

. . . .

(c) Motion and Proceedings Thereon. . . . . The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . .

. . . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise specified in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

2. The statues applicable to this case are as follows:

Texas Labor Code § 21. 001 Purposes:

The general purposes of this chapter are to:

(1) provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments (42 U.S.C. § 2000e *et seq.*);

(2) identify and create an authority that meets the criteria under 42 U.S.C. § 2000e-5(c) and 29 U.S.C. § 633;

(3) provide for the execution of the policies